IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04/02/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

CRIMINAL APPEAL NO.903 of 1996

1. K.Thambiraja
2. Siva @ Sivalingam .. Appellants

-Vs-

The Intelligence Officer,
Narcotic Control Bureau,
South Zone, T.Nagar, Madras. .. Respondent

Criminal Appeal is directed against the judgment dated 3.10.1996 passed in C.C.No.169 of 1994 of by the Court of Special Judge for NDPS Act, Madras, as stated therein.

!For Appellants: Mr.P.Venkatasubramaniam.

^For Respondent: Mr.P.N.Prakash, Spl.Public Prosecutor.

:JUDGMENT
The above Criminal Appeal is directed against the judgment dated 3 .10.1996 passed in C.C.No.169 of 1994 by the Court of Special Judge for NDPS Act Cases, Madras, thereby convicting the first appellant for an offence punishable under Section 29 of N.D.P.S.Act and sentencing him to undergo R.I. for ten years and to pay a fine of Rs.1 lakh in default to undergo a further R.I. for a period of two years and convicting the second appellant for an offence punishable under Section 21 of N.D.P.S.Act and sentencing him to undergo R.I. for ten years and to pay a fine of Rs. 1 lakh, in default to undergo a further R.I. for a period of two years.

2. Tracing the history of the case as projected by the prosecution, it comes to be known that on 20.7.1994, based on an information, the Officer of Narcotics Control Bureau, Madras visited Hotel Sri Krishna at 170,Linghi Chetty Street, Madras-1 and searched room No.209 under the occupation of A.1 to A.3; that during the course of search, a black zipper shoulder bag containing about 500 grams of heroin was found which belonged to A.1. The statement of accused and materials collected revealed that A.1, A.2 and A.3 knowingly acted in conspiracy to purchase, possess, conceal, transport and attempt to export to Sri Lanka about 500 grams of heroin, thus, the accused A.1, A.2 and A.3 have committed the offence under Section 8, 23, r/w 29 of N.D.P.S. Act punishable under Section 21 of N.D.P.S.Act.

3. The Special Judge, N.D.P.S.Act Cases, Madras, having taken the case on file and observing the usual formalities, would conduct a full trial in which the prosecution has examined 7 witnesses for oral evidence as P.Ws. 1 to 7 and marked 25 documents for documentary evidence as Exs.P1 to P25 and 5 Material Objects as M.Os.1 to 5.

4. P.W.1,is the Intelligence Officer in Narcotic Control Bureau, South Zonal Unit, T.Nagar, Madras and he would depose that he received the information on 20.7.1994 about the commission of offence by the accused got it reduced into writing as Ex.P1, reported the same to Superintendent of Police and on permission, went to the spot and conducted the search wherein he found M.O.1 zipper shoulder bag which belonged to A1, in which they found 5 polythene packets underneath the clothing each of which contained 100 grams of Heroin and he seized the whole quantity of 500 grams further recovering certain documents and observing the legal requirements as contemplated under the Act, seized certain documents under the cover of Ex.P.2 Mahazar; that the sample covers of the contraband are M.Os. 2 and 3 and the remaining cover containing Heroin is M.O.4; that the brown cover containing the file NCB polythene cover is M.O.5, the other documents recovered are Ex.P3, Ex.P4 series, Ex.P5 and Ex.P6; that he recorded Ex.P7 statement of the partner of Hotel Srikrishna and submitted Ex.P8 report to the Superintendent of Police under section 57 of the Act; that all the properties seized by P.W.1 were handed over to the Godown Officer under Es.P9 forwarding Memo; that Ex.P10 is the receipt issued and Ex.P11 is the remand report; that M.O.2 marked as S1 was sent to the Chemical Examiner along with Ex.P12 requisition.

5. P.W.2 is another Intelligence Officer, who would depose that he recorded the statement of the 2nd accused on 20.7.1994 under Ex.P1 4 and arrested the 2nd accused on 21.7.1994 under Ex.P15 arrest memo; that thereafter he sent Ex.P16 report under Section 57 of the Act to the higher officials.

6. P.W.3, another Inspector who accompanied P.W.1 at the time of raid, would depose that he recorded Ex.P16 statement of the first accused and caused the arrest of the first accused on 21.7.1994 and sent a report in Ex.P17 to the higher officials.

7. P.W.4, who is the Intelligence Officer of South zone Narcotic Control Bureau would depose that he recorded the statement of Mr. Kandasamy under Ex.P18 and after completing the investigation, he filed the charge sheet against the accused. P.W.5 who is the Central Excise Inspector would depose that he accompanied P.W.1 at the time of the raid and that he recorded Ex.P19 statement of the third accused, prepared Ex.P20 arrest memo and sent Ex.P.21 report under Section 57 of the Act. P.W.6 who is the Chemical Analyst, would depose that she gave Ex.P22 report and Ex.P23, the Test Memo. P.W.7 is the Receptionist of the hotel Sri Krishna who would depose that he issued Ex.P24 , receipt for the room, Ex.25 is the extract of the register of Hotel Sri Krishna.

8. The learned Special Judge, in consideration of the oral and documentary evidence and in further consideration of the materials placed

on record and appreciating the same in the context of the facts and circumstances of the case projected by the prosecution, has ultimately arrived at the conclusion that the first appellant (A2) is guilty of the offence punishable under Section 29 of the NDPS Act and the second appellant (A3) is guilty of the offence punishable under Section 21 of the NDPS Act and thereby convicting the sentencing the appellants as aforementioned. Aggrieved, the appellants herein have come forward to prefer the above criminal appeal on the ground as setforth in the grounds of appeal. The appeal preferred by the first accused has not been taken up for consideration since he is reported dead during the pendency of the appeal and none of his legal representatives have come forward nor willing to prosecute the said appeal and hence the Appeal preferred by these two appellants is heard and decided by this judgment.

9. During arguments the learned counsel appearing on behalf of the appellants besides submitting the memorandum of arguments, also advanced his oral arguments, the sum and substance of which is that the prosecution is burdened to prove its case beyond all reasonable doubts whereas the appellants so far as the defence version is concerned, they can establish their case with preponderance of probability and the Court can act on such evidence and acquit the accused; that the prosecution has not examined any independent witness to show that the investigation was above board and that it followed the various mandatory provisions of law; that since the evidence of the Officers are contrary to one another, an independent corroboration has become necessary in the case of the prosecution; that the evidence of the witnesses P.Ws.1 to 5 are not inspiring confidence; that P.W.6, Chemist, also does not corroborate the official witnesses and hence there is a very chance of foisting the case against the appellants.

10. Learned counsel would further submit that conscious possession of Heroin was not proved so far as it is concerned with these appellants; that the evidence and the confession statement under section 67 of the Evidence Act which is permissible in law needs corroboration because of the nature and time of confession, time of arrest, production before the Magistrate etc.; that the incriminating circumstances were not brought forth by the Special Judge so as to enable the accused to offer explanation in their statement.

11. Learned counsel then pointed out the contradictions in between the evidence of P.W.1 and the other witnesses regarding taking of the samples; that P.W.1 states that from each packet they took 5 gms and after collecting the same, he took two samples, whereas the evidence of the other official witnesses who were present in the search along with P.W.1 have deposed that the entire contraband of 500 gms was poured into one of the packets, mixed thoroughly and only thereafter, two samples of 5 gms each were taken; that these variations regarding the collection of samples clearly establish the contradicting version among the P.Ws themselves; that the report of P.W.6 Chemical examiner does no corelate the seizure; that P.W.1 states that the officials took a kit and weighed and tested the contraband, whereas the report of the Chemical examiner in Ex.P22 and P.23 coupled with the

evidence of P.W.6 , the samples were found to weigh 5.4 gms in each packet. These are the doubtful circumstances created regarding the quantity of the contraband seized.

12. Learned counsel would then point out that P.W.1 during his cross-examination has stated that he did not have any idea whether any raid was conducted at the house at Annanagar for Narcotic Drugs; that P.W.3 in his cross-examination by the third accused specifically stated that when the raid was conducted P.W.1 and P.W.2 were present; that even though the prosecuting officers have searched the house of one Kandasamy as per the evidence of P.W.3 and his statement was recorded by P.W.4 for no reason assigned he has not been examined though his statement was obtained thereby clearly showing that the investigation is not above board; that the statement made by the said Kandasamy is material for the purpose of corroboration of the statement made by the accused under Section 67 of the Act; that though the statement made before the Officer is admissible under section 67 of the Act, the following aspects do not lend credence to the statement made before them; that the appellants and the first accused were taken into custody by the authorities at 10 a.m. On 20.7.1994; that the search has been conducted at 7.30 a.m, though it is 8 a.m. that day as per the evidence.

13. It is P.W.1's evidence that (a) within a few minutes after entering the room, they were able to take the contraband and prima facie they came to the conclusion that the accused have committed the offence under the N.D.P.S. Act. (b) that P.W.3's evidence in cross is that the accused and other persons were brought to N.C.B office at about 10.a.m. on 20.7.1994; (c) that the search, seizure, preparation of mahazar and recording of statement including that of Kandasamy according to all the officials were over by 2 p.m. and after 2. p.m. there were no progress in the investigation but the arrest date has been shown as on 21.7.1994 at about 7 a.m. belatedly in order to cover the delay since they were produced before the Magistrate only at 4.25 p.m. on 21.7.1994. No proper reason has been assigned for showing the arrest of the accused the next day even though right from the time of search they were under the custody of the departmental officials, P.Ws 1 to 5. (d) that even though the recording of all the statements have been done between 10 a.m and 12 p.m. On 20.7.1994 they along with the seized articles reached the Court only on 21.7.1994 though the time is not mentioned by the Magistrate for the receipt of those items though in the normal course it is done; that the prosecution has not established that the statements were voluntary and not recorded under coercion. The non-explanation by the prosecution regarding the delay in arrest and causing production of the statements and articles before the Court throw considerable doubt on the case of the prosecution, regarding the voluntary rendering of the statement by the accused.

14. Learned counsel would then focus his attention on the statutory compliance of Section 50 of the act. The non-compliance of Section 5 2(A) has also been admitted by P.w.1 in view of the Magistrate returning the articles to the prosecution for being produced before the Court of Special Judge, N.D.P.S. Cases on 22.7.1994 and the samples according to the evidence weighing 5 gms but according to the chemical examiner weighing 5.4 gms. The

possibility of mixing spurious substance into the same cannot be ruled out. These aspects were not at all considered by the Special Court, particularly regarding the report sent under Section 57 to the higher authorities as mandated by law which were received by the Magistrate on 21.7.1994 and without the initials, date and time of the Magistrate, this throws doubts regarding the recording of the statement, whether it was on 20.7.1994 or at the later date in point of time; that the report sent to the superior officer regarding the search and seizure since being the earliest document coming into existence, has been sent along with the other report made under section 57 thereby showing that all the reports have been made after the arrest of the accused on 20.7.1994 as a result of afterthought and hence the report sent to the superior officers regarding the propriety of the search and seizure lend no credence and it vitiates the conviction.

15. Regarding reliability of the evidence of P.W.7 on the ground that he is the independent witness particularly for the purpose of corroboration since he is the only witness attesting Ex.P2 Mahazar; that even in the document the time of opening and closure are not mentioned but only the time of search has been mentioned as at 8 a.m. It is the admitted case of P.W.7 that he knows only Kannada language and cannot write English on his own but his statement is in English running to three pages. Hence, it has to be concluded that the statement of P.W.7 is not genuine. Moreover, the exact date of reaching of this statement to the Court is not feasible and bluntly only the date is offered as 12th which could be presumed as 12.10.1994 since Ex.P9 document regarding the deposit of the contraband bears the seal of 12.10.19 94. All the above aspects throw considerable doubt regarding the search, seizure and other procedures followed and hence the evidence of the prosecution regarding these aspects has to be rejected in toto giving the benefit of doubt to the accused.

16. The learned counsel would then argue that the reliance placed by the prosecution on the entry register, train tickets, bus tickets, telephone diary etc., cannot be taken on their face value of corroboration because in the normal course, the train ticket is collected by the ticket collector at the exit; that the ticket does not contain part iculars which should have been entered therein and the reservation charge in this connection has not been summoned for proof of the same, and hence it would not show the travelling of the appellants by train; that the bus tickets cannot also be used for corroboration to the statement made under section 57. Regarding the lodge register, it is the prosecution case that they started on 14.7.1994 and were staying at Kandasamy's house on 17.7.1994 but according to A3 they travelled from Bombay; that the same according to A1 and A2 they started on 15.7.1994 and they came to Chennai and stayed in the Room No.209. Ex.P24 is dated 16.4.1994; that the time of arrival is corrected. Even in Ex.P25 the correction has been shown regarding the date and time; that the room has been booked only for a day but according to P.w.7 the accused booked it for 3 days but according to Ex.P24, the accused ought to have vacated on 19.7.1994 and that on 20.7.1994 they would not have been present there; that the lodge register has been corrected changing the date from 16.7.1994 to 17.7.1994, the corrections are also not countersigned by P.W.7, hence from Exs.P24 and P.25 it cannot be suggested that they were present in Room No.209 on 20.7.1994. In

short, the learned counsel would exhort that all the above facts coupled with the violation of Sections 50, 52, 52(A), 55 and 57 of the Act and the various contradictions of the facts would make the conviction liable to be set aside.

17. The learned counsel would also rely on the following judgments on certain legal propositions. The first one being that of the Honourable Apex Court reported in 2000 Supreme Court Cases (Criminal) 829 (KOLUTTUMOTTIL RAZAK Vs. STATE OF KERALA) wherein, it has been held that "the non-compliance of Sections 42 of the Act will render the search and seizure suspicious and hence, the conviction under Section 21 has to be rejected". The next judgment cited is also that of the Honourable Apex Court reported in 2000 Supreme Court Cases (Criminal) 1228 (K.MOHANAN Vs. STATE OF KERALA) wherein, the mandatory requirement of Sections 50 and 57 of the N.D.P.S. Act, is dealt with in the following terms:

"The main legal point canvassed before us is that the mandatory requirement in Section 50 of the Act has not been complied with. It is recited in the judgment that P.W.1, before the search was conducted, asked the appellant whether he required to be produced before a gazetted officer or a Magistrate for the purpose of search and that the appellant answered in the negative. In order to ascertain whether the said recital is authentic, we called for the original records. Though the evidence is recorded in vernacular we found from the testimony of P.W.1 that the aforesaid recital is substantially correct."

"The Constitution Bench of this Court in State of Punjab Vs. Baldev Singh has considered various aspects of the compliance of Section 50 of the Act. The Bench has laid down the propositions of law of which the first and second are extracted below: (SCC pp.208-09, para 57)

"57.(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2)That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused".

18. The learned counsel would also cite many other judgments for the need of the corroborative evidence to be adduced to that of the official version. For instance two important judgments would be submitted both of the Honourable Apex Court, the first one reported in 2000 SCC (Criminal) 829 (KOLUTTUMOTTIL RAZAK Vs. STATE OF KERALA), wherein, it is held that "Non-compliance with the requirements of Section 4 2 (1) and (2) would render the resultant search and seizure suspect, though that by itself may not vitiate the proceedings. ABDUL RASHID IBRAHIM MANSURI Vs. STATE OF GUJARAT, (2000) 2 SCC 513 relied on. In the second judgment reported in 2001 Supreme Court Cases (Criminal) 42 6 (GURBAX SINGH Vs. STATE OF HARYANA) the Honourable Apex Court has held that "Provisions of Sections 52 and 57 are directory and violation thereof would not ipso facto violate the trial or conviction . However, investigating officer cannot totally ignore these provisions. Such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article."

19. The learned counsel would then submit that presumption under Sections 35 and 54 of the Act has to be followed and citing from the judgments reported in
(a) 2002 SCC (Crimes) 1035;
(b) 1998 MLJ (Criminal) 46; and
(c) 1954 MLJ (Criminal) 156.
the learned counsel would exhort that these judgments support the case of the prosecution provided the accused are found in conscious possession of the contraband, but in the case in hand the conscious possession of the contraband by the appellants has not been established and the evidence of the prosecution cannot be relied on since bereft of corroboration by independent witnesses and also since there is considerable doubt about the raising of the presumption under Sections 35 and 54 of the Act.

20. That in the recent decision of the Supreme Court reported in JT 2002 (7) SC 245 (AVTAR SINGH AND OTHERS Vs. STATE OF PUNJAB) regarding possession, it is held as follows:
"Possession is the core ingredient to be established before the accused in the instant case are subjected to the punishment under Section 15. If the accused are found to be in possession of poppy straw which is a narcotic drug within the meaning of clause (xiv) of Section 2, it is for them to account for such possession satisfactorily; if not, the presumption under Section 54 comes into play. The word ' possession' no doubt has different shades of meaning and it is quite elastic in its connotation. Possession and ownership need not always go together but the minimum requisite element which has to be satisfied is custody or control over the goods. Can it be said, on the basis of the evidence available on record, that the three appellants One of whom was driving the vehicle and other two sitting on the bags, were having such custody or control ? It is difficult to reach such conclusion beyond reasonable doubt. It transpires from evidence that the appellants were not the only occupants of the vehicle. One of the persons who was sitting in the cabin and another person sitting at the back of the truck made themselves scarce after seeing the police and the prosecution could not establish their identity. It is quite probable that one of them could be the custodian of goods whether or not he was the proprietor. The persons who were merely sitting on the bags, in the absence of proof of anything more, cannot be presumed to be in possession of the goods. For instance if they are labourers engaged merely for loading and unloading purposes and there is nothing to show that he goods were at least in their temporary custody, conviction under Section 15 may not be warranted. At best, they may be abettors, but, there is no such charge here. True, their silence and failure to explain the circumstances in which they were travelling in the vehicle at the odd hours, is one strong circumstance that can be put against them. The object of examination under Section 313, it is well known is to afford an opportunity to the accused to explain the circumstances appearing in the evidence against him. It is unfortunate that no question was asked about the possession of goods. Having regard to the charge of which appellants were accused the failure to elicit their answer on such a crucial aspect as possession, is quite significant. In this state of things, it is not proper to raise a presumption under Section 114 of Evidence Act nor is it safe to conclude that the prosecution established beyond reasonable doubt that the appellants were

in possession of poppy husk which was being carried by the vehicle".

21. Extracting the paragraph from the above judgment the learned counsel would submit that the Special Judge has neither questioned about the appellants' conscious possession nor brought about the incriminating aspects of the nature of evidence and their implications during questioning under Section 313 Cr.PC. and hence, the appellants were not able to give reasonable explanation.

22. The learned counsel would then state that P.W.1 has not followed the mandate laid down under Section 42(1) of the N.D.P.S. Act, wherein, he has to show his reasonable belief or ground for proceeding with the search that in the case in hand only the information has been marked as Ex.P.1 and no material has been marked to show the requirement of law regarding reasonable belief or ground recorded anywhere and would cite the judgment reported in 2002 (5) Supreme 545 (STATE OF ORISSA Vs. LAXMAN JENA) wherein, it is held that "under second part of Section 42(1) of the Act designated officer was under a legal obligation to comply with mandate of proviso to sub-section (1) providing for recording of grounds of his belief to make search in terms of power conferred upon him; that before making search, officer concerned had not recorded reasons or grounds for his belief to make search in terms of proviso to Section 42(1) of the Act□Acquittal order is not liable to be interfered with."

23. On such arguments, the learned counsel for the appellants would ultimately pray to allow the appeal setting aside the conviction and sentence as passed by the trial Court as per the judgment dated 3.10 .1996 in C.C.No.169 of 1992.

24. On the part of the respondent, the Special Public Prosecutor appearing on their behalf, would not only apprise this Court of the facts and circumstances of the case of the prosecution, but also bring out certain other facts in consideration of which, the trial Court has validly arrived at a conclusion to convict and sentence the accused in this case. The learned counsel would lay emphasis that it is heroin weighing 500 grams which is the subject matter and both the appellants before this Court are Sri Lankan Nationals; that the occurrence had taken place on 20.7.1994 and the judgment has been delivered on 3 .10.1996 with R.I. for 10 years and a fine of Rs.one lakh, in default to undergo further R.I. for 2 years; that the scene of occurrence is Sri Krishna Hotel located at Lingi Chetty Street, Chennai; that on definite information, the Officers of the Narcotic Control Bureau led by P.W.1 went to the lodge and on checking the reception book of Arrival and Departure, he found out the stay of the accused in Room No.2 09 of the Sri Krishna Lodge and found Heroin weighing 500 grams being kept in a zipper and the other two accused (A2 and A3) have knowingly acted in conspiracy to conceal, transport and attempt to export the said item to Sri Lanka, thus, they all committed the offences under Sections 8, 23 r/w. 29 of the N.D.P.S. Act punishable under Section 21.

25. The learned Special Public Prosecutor would point out that all the witnesses numbering seven have in an unequivocal voice deposed to

the crime of the accused and there is no much contradiction or inconsistency or irregularity in their evidence as it is wrongly alleged on the part of the appellants.

26. The learned Special Public Prosecutor would then cite the judgment reported in 1998 M.L.J (Crl) (vol.42) 46 (ASSISTANT COLLECTOR OF CUSTOMS, MADRAS v. GOVINDASAMY RAGUPATHY) and would recite para 22 which is extracted hereunder:-

"With regard to the culpable mental state of the accused as envisaged under Section 138-A of the Customs Act, the said section read as follows:-
"Presumption of culpable mental state:- (1) In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
Explanation: In this section, "Culpable mental state" includes intention, motive, knowledge of fact and belief in, or reason to believed, a fact.
(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

From the reading of the above section along with the explanation it is made clear in no uncertain terms the following dictum of law pertaining to the presumption and the burden of proof so far as a case under the Customs Act is concerned, especially when seizure of the contraband is undoubtedly from the accused.
(i) That the court shall presume the existence of culpable mental state on the part of the accused and the burden of the accused to prove the fact that he had no such mental state is paramount and heavily cost on him;
(ii) As per the explanation to the above section, the "culpable mental state" includes intention, motive, knowledge, belief or reason to believe a fact.
(iii) The standard of proof expected from the accused under such circumstances is beyond reasonable doubt and not preponderance of probability."

27. The learned Special Public Prosecutor would cite from a very old judgment reported in 1954 M.W.N.(Cr.) 136 (S.C.) (HEM RAJ v. STATE OF AJMER) for the proposition that a confession can be corroborated by use of materials already in the possession of the police.

28. The learned Special Public Prosecutor would also cite the judgment reported in : 2000 (10) S.C.C. 312 (GANGA BAHADUR THAPA v. STATE OF GOA) wherein it is held:-

"The only contention raised before us was that a room in a hotel when it is occupied by a customer cannot be said to be a public place as no one has

thereafter a right to enter that room except the said occupier and the owner of that room. we do not find any substance in this contention. The explanation to section 43 makes it clear that for the purpose of that section public place includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public. It is not in dispute that the said hotel was intended for use by, or accessible to, the public. Merely because a customer is allowed to occupy a room in the hotel, it would not cease to be a hotel. Even after occupation by a customer it would remain a hotel and not a private property of the occupier. It would not cease to be a public place as contemplated by Section 43. For that reason, we cannot accept the contention that because the raid was made after sunset and no grounds as contemplated by section 42 were recorded, the search was illegal and the evidence regarding recovery pursuant to that illegal search was not admissible."

29. The learned Special Public Prosecutor would also cite from the judgment reported in 1997 (3) S.C.C. 721 (K.I. PAVUNNY v. ASSISTANT COLLECTOR (HQ), CENTRAL EXCISE COLLECTORATE, COCHIN) wherein the Hon'ble Supreme Court has held:-

"The question then is whether the retracted confessional statement requires corroboration from any other independent evidence. It is seen that the evidence in this case consists of the confessional statement, the recovery panchnama and the testimony of P.Ws.2, 3 and 5. It is true that in a trial and proprio vigore in a criminal trial, courts are required to marshal the evidence. It is the duty of the prosecution to prove the case beyond reasonable doubt. The evidence may consist of direct evidence, confession or circumstantial evidence. In a criminal trial punishable under the provisions of the I.P.C., it is now well-settled legal position that confession can form the sole basis for conviction. If it is retracted, it must first be tested whether confession is voluntary and truthful inculpating the accused in the commission of the crime. Confession is one of the species of admission dealt with under Sections 24 to 30 of the Evidence Act and Section 164 of the Code. It is an admission against the maker of it, unless its admissibility is excluded by some of those provisions. If a confession is proved by unimpeachable evidence and if it is of voluntary nature, it when retracted, is entitled to high degree of value as its maker is likely to face the consequences of confession by a statement affecting his life, liberty or property. Burden is on the accused to prove that the statement was obtained by threat, duress or promise like any other person as was held in BHAGWAN SINGH v. STATE OF PUNJAB (AIR 1952 S.C. 214). If it is established from the record or circumstances that the confession is shrouded with suspicious features, then it falls in the realm of doubt. The burden of proof on the accused is not as high as on the prosecution. If the accused is able to prove the facts creating reasonable doubt that the confession was not voluntary or it was obtained by threat, coercion or inducement, etc., the burden would be on the prosecution to prove that the confession was made by the accused voluntarily. If the court believes that the confession was voluntary and believes it to be true, then there is no legal bar on the court for ordering conviction. However, the rule of prudence and practice does require that the court seeks corroboration of the retracted confession from other evidence.

The confession must be one inculpating the accused in the crime. It is not necessary that each fact or circumstance contained in the confession is separately or independently corroborated. It is enough if it receives general corroboration. The burden is not as high as in the case of an approver or an accomplice in which case corroboration is required on material particulars of the prosecution case. Each case would, therefore, require to be examined in the light of the facts and circumstances in which the confession came to be made and whether or not it was voluntary and true. These require to be tested in the light of a given set of facts. The high degree of proof and probative value is insisted in capital offences.

...

In HEM RAJ v. STATE OF AJMER (AIR 1954 S.C. 462), a three-Judge Bench to which BOSE, J. was a member, was to consider whether retracted confession of an accused could be corroborated from the material already in the possession of the police prior to the recording of the confession. Therein the confession was recorded under Section 164 of the Code during the committal proceedings but at the trial it was retracted. This Court held that the evidence already on record of the police could be used to corroborate the retracted confession.

...

It is true that in criminal law, as also in civil suits, the trial court and the appellate court should marshal the facts and reach conclusion, on facts. In a criminal case, the prosecution has to prove the guilt beyond doubt. The concept of benefit of doubt is not a charter for acquittal. Doubt of a doubting Thomas or of a weak mind is not the road to reach the result. If a Judge on objective evaluation of evidence and after applying relevant tests reaches a finding that the prosecution has not proved its case beyond reasonable doubt, then the accused is entitled to the benefit of doubt for acquittal. The question then is whether the learned Single Judge of the High court has committed any error of law in reversing the acquittal by the Magistrate. Not every fanciful reason that erupted from flight of imagination but was relevant and germane, requires to be tested. Reasons are the soul of law. The best way to discover truth is through the interplay of viewpoints. Discussion captures the essence of controversy by its appraisal of alternatives, presentation or pros and cons and review on the touchstone of human conduct and all attending relevant circumstances. Truth and falsity are sworn enemies. Man may be prone to speak falsehood but circumstantial evidence will not. Falsity is routed from man's proclivity to faltering but when it is tested on the anvil of circumstantial evidence truth stands. On scanning the evidence and going through the reasoning of the learned Single Judge we find that the learned Judge was right in accepting the confessional statement of the appellant Ex.P-4 to be a voluntary one and that it could form the basis for conviction. The Magistrate had dwelt upon the controversy, no doubt on appreciation of the evidence but not in proper or right perspective. Therefore, it is not necessary for the learned Judge of the High Court to wade through every reasoning and give his reasons for his disagreement with the conclusion reached by the Magistrate. On relevant aspects, the learned Judge has dwelt upon in detail and recorded the disagreement with the Magistrate and reached his conclusions. Therefore, there is no illegality in the approach adopted by the learned Judge. We hold that the learned Judge was right in his findings that the prosecution has proved the case based upon the confession of

the appellant given in Ex.P-4 under Section 108 of the Evidence Act and the evidence of P.Ws.2, 3 and 5. The prosecution proved the case beyond doubt and the High Court has committed no error of law."

30. The learned Special Public Prosecutor would also cite the judgment reported in 2002 S.C.C. (Cri) 1035 (A.K. MEHABOOB v. INTELLIGENCE OFFICER, NARCOTICS CONTROL BUREAU) wherein it is held:

"The substance of the case against the three accused was this:-
On the strength of sleuth information the Intelligence Officers of the Narcotics Control Bureau led by the Superintendent of the Narcotics control Bureau, Cochin (P.W.1 and P.W.2) raided the house of the appellant Naushad on 6.3.1994 at about 10.00 A.M. They found Divakaran (A-1) and appellant Mehaboob (A-3) sitting in one room. On search, 251 grams of brown sugar had been recovered from Divakaran, A-1. It was followed by another search made in the house of the said Divakaran at about 7.00 P.M. and then also a quantity of 251 grams of brown sugar had been recovered from a suitcase kept in that house. All the three accused were arrested. Their statements were recorded under Section 67 of the Act.
The case against appellant Naushad depends entirely on Exhibit P-8 statement made to the officer under Section 67. There is no dispute that if the said statement is found to be genuine and reliable, the appellant Naushad has no escape from conviction, for it contained a vivid description of the transaction he entered into with Divakaran in the trafficking of narcotic drugs 'heroin' and 'brown sugar'.
Smt.Malini Poduval, the learned counsel for the appellants, contended that Exhibit P-8 cannot be relied on for more than one reason. One is that the said statement had been retracted by the accused himself. Second is that on 11.3.1994 the appellant Naushad informed the Magistrate in writing that the said statement had been coaxed out from him. The third is that the said retracted confession had no corroboration and, therefore, cannot be made the basis for conviction.
There is nothing to indicate that Exhibit P-8 had been elicited from A-2 by any coercion, threat or force and, therefore, the learned Single Judge of the High Court had spurned down that contention. Regarding the complaint alleged to have been made by the appellant Naushad on 11.3.1994, we have perused it. His case therein was that he offered himself to be a witness in the case and some reward was offered for it. It was on the said offer that he agreed to sign the said statement. It must be remembered that the appellant Naushad has no case that when he was produced before the Magistrate immediately after his arrest, that he made any grievance of any maltreatment administered to him by the members of the Narcotics Control Bureau. Wisdom dawned on him (when the complaint dated 11.3.1994 was filed) to put up an advance defence against the statement given by him under his own signatures. Even then he did not think it necessary to make any allegation that any intimidatory tactic, much less any third-degree method had been applied on him. His case in the said complaint that a reward was offered to him and hence he agreed to sign the statement is contrary to the present stand adopted by him that he was coerced and threatened to make such a statement. The learned Single Judge had rightly repelled the contentions made on behalf of the appellant Naushad relating to Exhibit P-8.

Smt Malini Poduval, learned counsel for the appellants then contended that there was violation of Sections 42 and 57 of the Act. Both contentions cannot be countenanced by us for two reasons. One is that they were not seriously pressed into service before the High Court. Second is that there is no factual basis for such contentions. On the other hand, P.W.2 has said in so many words that he has recorded the information in his personal diary as well as in the official diary as soon as he got the information that narcotic drugs were being transacted in the house of the appellant Naushad. P.W.2 had admitted during cross-examination that he had submitted a report to his superior officers. That statement shows that he had acted in conformity with Section 57 of the Act.
As the appellant Naushad failed to succeed on any of the points raised by him, we do not find any reason to interfere with the conviction and sentence passed on him by the High Court."

31. The learned Special Public Prosecutor would also cite from another judgment reported in JT 1999 (8) S.C. 293 (KALEMA TUMBA v. STATE OF MAHARASHTRA AND ANOTHER) wherein the Hon'ble Supreme Court has held:

"Ms.M.Qamaruddin, learned counsel for the appellant, submitted that the mandatory requirement of Section 50 of the N.D.P.S. Act was not complied with and therefore the evidence regarding recovery and seizure of heroin should be regarded as illegal. She further submitted that the appellant could not have been convicted on the basis of that evidence. It was submitted by her that the appellant was not told, before the search by the officers of the Narcotic Control Bureau that he had a right to be searched in presence of a Gazetted Officer or a Magistrate. This contention deserves to be rejected because only when a person of an accused is to be searched then he is required to be informed about his right to be examined in presence of a Gazetted Officer or a Magistrate. As rightly pointed out by the High Court search of baggage of a person is not the same thing as search of the person himself. In STATE OF PUNJAB v. BALDEV SINGH (J.T. 1999 (4) S.C. 595) this Court has held that the requirement of informing the accused about his right under Section 50 comes into existence only when person of the accused is to be searched. The decision of this Court in STATE OF PUNJAB v. JASBIR SINGH AND OTHERS (J.T. 1995 (9) S.C. 308) wherein it was held that though poppy straw was recovered from the bags of the accused, yet he was required to be informed about his right to be searched in presence of a Gazetted Officer or a Magistrate, now stands overruled by the decision in Baldev Singh's case (supra). If a person is carrying a bag or some other article with him and narcotic drug or the psychotropic substance is found from it, it cannot be said that it was found from his 'person'. In this case, heroin was found from a bag belonging to the appellant and not from his person and therefore it was not necessary to make an offer for search in presence of a Gazetted Officer or a Magistrate."

32. On such arguments the learned Special Prosecutor would ultimately submit that there is no pith or substance in the arguments advanced on behalf of the appellants, since the prosecution has not only put up a true case, but also in total compliance of the mandatory provisions of law the

prosecution case has been investigated into and projected before the trial Court and hence, in appreciation of such valid evidence made available the trial Court has arrived at the conclusion to hold the accused guilty of the offence charged awarding the sentence as prescribed by law and therefore, there is absolutely no necessity on the part of this Court to cause interference into the said judgment of the trial Court and would pray for confirming the same.

33. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, what could be assessed by this Court from the whole of the case, as put up by the prosecution is that it is a case arising out of an offence alleged to have been committed on the penal provisions of the N.D.P.S.Act punishable under Sections 29 and 21 by both the accused on the case put up by the prosecution that on 20-07-1994, on a reliable information the Officer from Narcotics Control Bureau, Chennai, inspected the Hotel Sri krishna at 170, Linghi Chetty Street, Chennai-1 and searched room NO. 209, which was under the occupation of the A.1 to A.3, of whom the appellants are A.2 and A.3; that during the course of search a black zipper shoulder bag containing about 500 grams of Heroin is said to have been found, which was belonging to the first accused and the A.2 and A.3 joining hands with the first accused, acted in conspiracy to purchase, possess, conceal, transport and attempt to export to Sri Lanka the said Heroin, thus these accused committing the offence under Sections 8 and 23 r/w. 29 of the N.D.P.S. Act punishable under Section 21 of the said Act; that the Special Judge, N.D.P.S. Act cases conducted the trial, during which the prosecution which is burdened with the proof of the said case with such standard of proof beyond reasonable doubts have examined seven witnesses, besides marking 25 documents and 5 material objects with no defence witnesses or exhibits examined and marked and the said Judge in consideration of the facts and circumstances of the case put up by the prosecution in the light of the evidence placed on record and appreciating the same in its own way would ultimately hold that the case of the prosecution was proved against the accused beyond all reasonable doubts and convicted them in the manner aforementioned, testifying the validity of which the first accused separately and the A.2 and A.3 jointly have preferred the Appeals before this Court and since, the first accused is reported dead, during the pendency of this Appeal, only the above Appeal preferred by the A.2 and A.3 jointly in the above manner has been heard and this judgment is being delivered.

34. The contraband alleged to have been seized from the appellants by the Prosecuting Officials is Heroin, weighing 500 gms kept in M.O.1 black zipper shoulder bag belonging to the first accused, packed in 5 polythene packets, each containing 100 gms. It is also the case of the prosecution, that they also seized certain documents from the accused under the cover of Ex.P.2, Mahazar; that the sample covers would be marked as M.Os. 2 and 3, the remaining Heroin contained in the cover as M.O.4 and the brown cover with the Narcotics Control Bureau seal would be marked as M.O.5 and the documents seized are Exs.P.3 to P.6, which are the ticket series, the mini-telephone diary and the bus tickets; that M.O.2 marked as S.1 was sent to the Chemical Examiner and Ex.P.22 is the Chemical Analyst Report, which is to the effect that "The sample is in the form of brown coloured powder. It

answers test for the presence of Diacetyl Morphice (Heroin) covered under Narcotics Drugs and Psychotropic Substances Act, 1985".

35. Among the witnesses examined, P.W.1 was the Intelligence Officer in the Narcotics Control Bureau, South Zone Unit, Chennai, who received the information that three Srilankan stay at Hotel Srikrishna, 1 70, Linghi Chetty Street, Chennai-1, were in possession of 500 gms of Heroin and they were likely to proceed to Trichy and submitting Ex. P.1, to his Superintendent on being permitted to proceed to the said Hotel and conduct the search. He along with the other colleagues P.Ws. 2 to 5, visited the said Hotel and met P.W.7, the Manager and the caretaker of the hotel and on perusal of the hotel register raided the said room and seized the contraband and secured the accused observing all legal requirements in the manner already extracted supra, during the assessment of the evidence of those witnesses.

36. P.Ws. 2 and 3 would also adduce evidence adhering the evidence of P.W. 1, who obtained the written confession statement of the second accused i.e., Ex.P.14, himself attesting as a witness and caused his arrest under Ex.P.15, Seizure Memo and sent a report to the Higher Official in Ex.P.16 and P.W.3, who also witnessed the occurrence and then obtained the statement from one Kandasamy in Ex.P.16 and submitted the report in Ex.P.17. It is P.W.4, who would also be present at the time the said Kandasamy gave the report. P.W.5 would stand as a guard outside the room of the lodge and it is this witness, who has examined the third accused and obtained the statement, which was given in writing by the accused, which is Ex.P.19 and would cause his arrest under the Ex.P.20, arrest memo and would send report under Section 57 of the N.D.P.S. Act to his superiors, which would be marked as Ex.P.21. P.W.16 is the Analyst, who examined the sample of the contraband and certified it to be Heroin as already seen. P.W.7 is the Manager and Receptionist and would adduce evidence to the effect of the Officers of the Narcotics Control Bureau approaching him and this witness would also ascertain safe for the compliance of Section 50 to have conveyed and would narrate the whole occurrence on the spot adhering the case of P.W.1, besides standing as a witness to the Ex.P.2 Mahazar and seizure of M.Os. 1 to 4 under the cover of Ex.P.7.

37. A study of the evidence adduced by all these witnesses regarding the information and the raid undertaken at the Hotel, the seizure of the contraband effected and the arrest of the accused in the presence of the P.Ws. 1 to 5 and 7 and the certification of the Contraband as Heroin by P.W.6, Chemical Analyst and the manner in which the seizure was effected, the confession statement of the accused recorded, the arrest of the accused made and the intimation under Section 57 of the N.D.P.S. Act to the superior Officers have all been done in a satisfactory manner in accordance with the provisions of law as evidenced by the exhibits and M.Os. Marked.

38. While that being so, the trial Court as per its judgment would not only trace the facts and circumstances of the case, without missing even the minute points to be verified on the part of the prosecution and assessing the evidence adduced in all and appreciating the same in the

manner required by law would ultimately arrive at the conclusion to hold that the case of the prosecution has been proved beyond all reasonable doubts against the accused and would convict and sentence both the accused to undergo the punishment mentioned supra.

39. While such being the fact, on the part of the appellants it would be alleged that the evidence of P.Ws. 1 to 5 are not inspiring confidence and the evidence of P.W.7 could not be considered as an independent witness and the evidence of P.W.6 also does not corroborate the evidence of the Official Witness and therefore, there is every chance of foisting the case against the appellants.

40. Whether the instances broughtforth on the part of the appellants discrediting the evidence of P.Ws. are to the effect of the compliance of the mandatory or directory provisions of law do not in any manner go to show that there has been any serious irregularity committed on the part of the prosecuting Officials and that it could not also be said that the case of the prosecution is absolutely without independent corroboration of evidence, since P.W.7, through out the raid with the Official Witnesses P.Ws. 1 to 5 has been watching and witnessing all the events regarding the approach, seizure of the contraband recording of the confession of the accused and causing of the arrest of the accused including the preparation of Ex.P.2 Mahazar as it comes to be known from his evidence and therefore, the irregularities, inconsistencies or improbabilities brought forth on the part of the appellants could only be treated as negligible in extent and the same could only be ignored and in no manner these minor defects could be taken to have affected the case of the prosecution. Even regarding the compliance of the mandatory and directory provisions of law say, under Sections 50, 52, 52(A), 55 and 57 of the Act, all these compliances have been taken care of utmost by the prosecuting Officials and no major inconsistency or irregularity or violation seems to have occurred regarding the compliance of these provisions of law, whether mandatory or directory in nature.

41. Even the trial Court has conducted the trial, giving all opportunities for the accused to be heard and it should be mentioned that the case as broughtforth before this Court on Appeal by the defence on behalf of the appellants, have no such grievances to be made before the trial Court since affording with such opportunity for the prosecution to take stock of the situation and shape their case, the trial has been held by the lower Court and these matters which have been brought anew have not been brought forth even during questioning under Section 313 Cr.P.C. and hence, it could be safely concluded that the prosecution has put up a uniform case and has proved the same to the standard of proof required by law beyond all reasonable doubts and the trial Court in appreciation of the evidence in the manner required by law has validly arrived at the conclusion to hold that the prosecution has clearly brought home the guilt of the accused and awarding the punishment prescribed by law in the manner that it has done and therefore, whether it is the conclusion that is arrived at by the lower Court or the manner in which the said conclusion has been arrived at do not require the interference of this Court to be made in any manner. Since the judgment of the trial Court, which is under challenge is a well considered and merited one, the interference

sought to be made on the part of the appellants into the same is neither necessary nor required in the circumstances of the case and in these circumstances, the only course open for this Court is to confirm the judgment of the trial Court and hence, the following judgment:

In result,
i.the above Criminal Appeal is without merit and the same is dismissed as such;
ii.the judgment dated 3-10-1996 made in C.C.No. 169 of 1994 by the Court of Special Judge for N.D.P.S. Act Cases, Madras, thereby convicting and sentencing both the appellants in the manner extracted supra and delivered by the trial Court is confirmed.
iii. However, since the default sentence passed by the lower Court for nonpayment of fine amount is on the higher side, the same is reduced to the period of one month. Therefore, the judgment of the lower Court shall be read as "both the accused are found guilty for the offences respectively punishable under Sections 29 & 21 of the N.D.P.S. Act and they are sentenced to undergo R.I. for a period of ten years and to pay a fine of Rs.1 lakh, in default to undergo further R.I. for a period of one month each.

paa

Index: Yes
Internet: Yes

To

1. The Intelligence Officer,
Narcotic Control Bureau,
South Zone, T.Nagar, Madras.

2. The Special Judge for NDPS Act Cases, Madras.

3. The Special Public Prosecutor, High Court, Madras.